No. 12,354

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

SAMUEL HARRISON, now known as James Thomas Payne,
Appellee.

BRIEF FOR APPELLEE.

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FOREWORD.

The appellee entered this country on July 3, 1940. He had been a merchant seaman for many years and had a wife and two children in Ireland. His wife and children did not accompany him and he has not seen them since. Within a month he had secured employment as a machine operator with Ceco Products Co., a San Francisco concern. He worked for that concern until he entered the military service on June 26, 1942. Appellee was seriously wounded during an air attack while serving in Alaska, and spent from 12 to 14 months in various army hospitals. (R. 35.) Upon release from the hospital he again went on active duty,

and was honorably discharged from the Army on November 24, 1945. (R. 10.) He had served overseas approximately 14 months. (R. 10.) Upon leaving the service the appellee resumed his former employment and at the time of the hearing was still employed by Ceco Products Co. A letter of commendation from the company was introduced in evidence on behalf of the appellee. (Pet. No. 1; R. 49.)

On December 26, 1946, appellee filed his petition for naturalization under the provisions of Section 701 of the Nationality Act of 1940. (8 U.S.C. 1001.) The Immigration and Naturalization Service recommended denial of the petition on the ground that the petitioner had failed to establish that he was a person of good moral character, as required by Section 324(A) of the Nationality Act of 1940, as amended June 1, 1948 (8 U.S.C. 724(a) and Section 307(a) of said Act. (8 U.S.C. 707.) The case was then heard before Honorable Herbert W. Erskine, Federal District Judge, who disapproved the recommendation of the Naturalization Service and ordered the appellee admitted to citizenship. (R. 16.)

CONTENTIONS OF THE GOVERNMENT.

The Government contends that the appellee's petition for naturalization should have been denied by the Honorable District Judge for the following reasons:

(1) Because the appellee, although he supported his family in Ireland during the first year and a half

of his stay in this country (R. 26), has failed to do so thereafter;

(2) Because the appellee entered into a bigamous marriage with one Naomi Clark in 1945; and

(3) Because four or five months prior to the filing of his naturalization petition, the appellee made a sworn statement to the United States Immigration and Naturalization Service in which he failed to reveal the fact of his first marriage in Ireland and the fact that he had two children by that marriage.

ARGUMENT.

In connection with this appeal it is important that the following general principles of naturalization law be kept in mind:

(1) Congress did not lay down any rules or tests for the determination of whether an applicant for citizenship possesses "good moral character", but left it to the discretion of the trial Court to determine this question. *Petitions of Rudder,* 159 Fed. (2d) 695, 697. The question is one to be determined from the facts of each particular case. *Daddona v. U. S.,* 170 Fed. (2d) 964, 966.

> "Good moral character for the prescribed period is a question of fact. In the case at bar that fact was found in the applicant's favor * * *."

(2) The Courts have become increasingly liberal in their determinations as to whether or not applicants

for citizenship are persons of good moral character. In *Petitions of Rudder,* supra, at page 698, the Court had this to say:

> "And the court decisions, following as they should the mores of the times, show an increasingly liberal trend in naturalization cases."

In that case the evidence showed that the petitioners had been living for years in adultery. Yet because of extenuating circumstances (inability to secure divorces), the Court held the applicants to be persons of good moral character. See also the most recent Circuit Court decision on the question of "good moral character", *Schmidt v. U. S.,* 177 Fed. (2d) 450. In that case the District Court denied citizenship because the applicant admitted to occasional acts of sexual intercourse with unmarried women. The Second Circuit Court reversed.

The modern test of whether an applicant for citizenship is a person of good moral character has been stated by the Court of Appeals for the Second Circuit in *Repouillie v. U. S.,* 165 Fed. (2d) 152, 153, to be the following:

> "'* * * whether the moral feelings now prevalent generally in this country would be outraged by the conduct in question * * *'"

(3) An honorable discharge from the United States military service is *prima facie* evidence of good moral character. *U. S. v. Rubia,* 110 Fed. (2d) 92.

(4) The trial judge, having found in the applicant's favor on the issue of good moral character,

should not be reversed unless his decision is erroneous as a matter of law. *U. S. v. Rubia,* supra, p. 93.

(5) In determining the question of "good moral character" a distinction should be made between the commission of crimes which are *malum in se* and those which are *malum prohibitum.* (*Petition of Schlau,* 41 F. Supp. 161, 163.)

> "The distinction between offenses which involve moral turpitude and those which are free of that taint is well recognized at law. That indicates that depravity of character and violation of law are not necessarily wedded together. The ancient differentiation between malum prohibitum and malum in se is a manifestation of the same common sense separation between offenses which spring from wickedness of character and those which do not."

We proceed now to a discussion of the Government's contention that the trial judge committed error as a matter of law in holding the appellee in this case to have been a person of good moral character during the five year period preceding his petition for naturalization. This contention is based on the following derelictions on the part of appellee:

(1) THE FAILURE OF THE APPELLEE TO SUPPORT HIS FAMILY IN IRELAND DURING THE 5 YEAR PERIOD IMMEDIATELY PRECEDING HIS PETITION FOR NATURALIZATION.

The applicant testified in the Court below that he was a merchant seaman by avocation and had been following the sea since he was 17 years old. (R. 32.)

His wife objected to him going to sea and told him she would leave him if he didn't quit the sea. (R. 32.) He came to the United States in July of 1940, but continued to support his children for the first year and a half of his stay in this country. (R. 31.) He testified at the time he came to the United States his family was "pretty well fixed". (R. 33.) When he left, his wife went with the children to live with her parents. The wife rented out a house which she and the appellee had just about completed purchasing when he left. (R. 33.) At no time did his wife ever ask the appellee for support. (R. 39.)

In 1947 he consulted a lawyer in San Francisco with a view to obtaining a divorce from his wife and deeding to her his interest in the home. (R. 39.) His wife wrote back, through an attorney, agreeing to this, but since that time the appellee's letters have not been answered. (R. 39.)

The only case cited by the Government in support of its position that it was error for the trial judge to hold that the foregoing course of conduct did not constitute bad moral character, is *In re Nosen,* 49 Fed. (2d) 817.

That case is a District Court decision, and while it may very well have been affirmed if appealed to the Circuit Court, it seems equally clear under the cases we have cited herein, that the Circuit Court would also have affirmed a decision of the District Court in favor of the applicant Nosen. The case, therefore, is in no way controlling or even persuasive as to the case at bar.

(2) THE MARRIAGE TO NAOMI CLARK IN 1945.

The appellee testified that while he was in the army and located at a base here in the United States, he met and married a Federal civilian employee at the base by the name of Naomi Clark. (R. 35.) Prior to his marriage to Naomi Clark he had been told by a merchant seaman friend of his that he understood that his wife in Ireland had obtained a divorce. (R. 27.) This marriage was annulled one year later because of the existence of the prior marriage. (R. 35.) The appellee testified that the reason he did not tell Naomi Clark about his prior marriage was that she was ill at the time and he felt that such a disclosure would be detrimental to her health. (R. 30.)

In support of its position that the bigamous marriage in this case precludes a holding of good moral character, the Government relies on the following cases:

U. S. v. Marafioti, 43 Fed. Supp. 45;
In re Schlau (C.C.A. 2), 136 Fed. (2d) 480;
U. S. v. Jakini, 69 Fed. Supp. 707;
U. S. v. Zgrebec, 38 Fed. Supp. 127.

The *Marafioti* case is a denaturalization case and is not in point here. There the petitioner entered into a bigamous marriage between the filing of his petition and the granting thereof. He failed to reveal the bigamous marriage at the final hearing on his petition. The Court held that the naturalization certificate was illegally procured because of the petitioner's failure to reveal a material change in status at the final hearing on the petition. The case does not stand for the

proposition that a bigamous marriage necessarily precludes a finding of good moral character.

In the *Schlau* case the Circuit Court did *not* reverse the District Court's decision in favor of the applicant. It merely remanded the case for the purpose of taking additional testimony on the question of whether or not the applicant believed in good faith that his former wife was dead.

In the *Jakini* case, the record indicated that Jakini had perpetrated a fraud against the Government, i.e., the obtaining of relief money under false pretenses. Jakini was prosecuted for the fraud and the case was settled by Jakini paying back to the relief authorities the sum of $2,000. The naturalization court held that this behavior on the part of Jakini indicated a lack of good moral character and citizenship was denied. We have no quarrel with this decision but fail to see ite relevancy to the case at bar.

The *Zgrebec* case was a denaturalization case involving the fraudulent failure of the naturalized citizen to reveal at the time of his naturalization the fact that he had knowingly committed bigamy and was then living with his second wife. The case at bar involves no fraud upon the Court and therefore the *Zgrebec* and other denaturalization cases cited by the Government are not in point.

The Government cited a number of other District Court decisions involving denials of citizenship for offenses similar to those involved in the case at bar. Conceding, *arguendo,* that these decisions would all

have been affirmed had they been appealed by the applicant, it does not follow that had they gone the other way they would have been reversed by the Circuit Court.

It is quite significant that the Government in the case at bar has not cited a *single* case in its opening brief involving a Circuit Court reversal of a decision of a district judge admitting a man to citizenship.* The paucity of cases of this nature is because of the rule that the granting or denial of citizenship is within the sound discretion of the trial judge and the trial judge's decision to grant or deny citizenship, will not be set aside unless there has been a clear abuse of discretion. (*U. S. v. Rubia,* supra.)

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(3) THE FALSE STATEMENT MADE BY THE APPELLEE ON AN IMMIGRATION FORM ON SEPTEMBER 17, 1946.

On September 17, 1946, the appellee, in filling out an application for suspension of deportation, stated that he had not been previously married and had no children. One month later the appellee, of his own volition, returned to the Inspector before whom he had filled out the form, and furnished the correct information. The U. S. Attorney declined to prosecute. (R. 12.)

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*While the final sentence in the *Schlau* case (*supra*), page 482, reads. "Reversed and remanded", actually the Circuit Court did not reverse but merely remanded the case to the District Court for the purpose of receiving further evidence.

Here again the Government fails to cite any authorities holding that it is an abuse of discretion for a district judge to grant citizenship to a man who has in the past admittedly made a false statement to the immigration authorities. The four perjury cases cited by the Government are District Court decisions denying citizenship.* In the *Spencer* case the applicant had been convicted of perjury and spent 15 months in jail for his crime. The *Chin Chan On* case involved an alien seeking admission to this country. Admission was denied because of perjured statements under oath made to the immigration authorities and also because the alien admitted that just before coming to this country he had been living in a state of polygamy with two wives in China. The *Mancini* case is another denaturalization case involving false statements made in the naturalization petition itself. The case is not in point here. The *Talarico* case, decided 38 years ago, also involved false statements made in connection with the naturalization petition itself, a situation which obviously presents a stronger case for denial than false statements made in another connection.

It is well settled under naturalization law that in determining whether an applicant possesses good moral character extenuating circumstances alter cases. (*Estrin v. U. S.*, 80 Fed. (2d) 105; *Schmidt v. U. S.*, supra.) The courts recognize that acts which might

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In re Spencer, 22 Fed. Cases 13,234;
Ex parte Chin Chan On, 32 Fed. (2d) 828;
U. S. v. Mancini, 29 F. Supp. 44;
In re Talarico, 197 Fed. 1019.

show a lack of good moral character as to one applicant would not necessarily show the same lack as to another applicant.

It was the opinion of the trial judge in the case at bar that extenuating circumstances in the case of this appellee, i.e., the fact that the appellee did support his family for some time and then sought to put legal title to the family home into his wife's name; the circumstances surrounding the marriage to Naomi Clark; the subsequent annulment of that marriage; the voluntary correction made by the appellee of the previous false statement made to the Immigration Inspector, prior to any change of position on the part of the Government; the voluntary service of the appellee in the United States Armed Forces; the serious injuries suffered by the appellee in the service of his adopted country—warranted the Court in tipping the scales in favor of the applicant.

The Government has cited no cases holding that in so deciding the trial judge committed error as a matter of law.

CONCLUSION.

We respectfully submit that the determination as to whether the appellee was a person of good moral character is a matter within the sound discretion of the trial judge and, having heard the evidence and having observed the applicant and his bearing and demeanor on the witness stand, the trial Court's decision to admit applicant to citizenship was not er-

roneous as a matter of law, and should not be reversed.

Dated, San Francisco, California,
February 1, 1950.

Respectfully submitted,
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